IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7546 OF 2005

Ashokkumar Sureshkumar Mehta .. Petitioner

Vs.

Nikhil Mahendra Kothari & Ors. .. Respondents

Mr.J.B.Kocheta for the petitioner

Mr.N.N.Vaishvawa i/b M/s.N.N.Vaishnawa and Co. for respondent no.1

CORAM : S.U.KAMDAR, J
DATED : 29TH NOVEMBER, 2005

P.C.:

1. Rule, returnable forthwith. Heard parties.

2. By the present petition, the order passed in review application dt.16.5.05 is under challenge. The suit which has been preferred by respondent is a Summary Suit and it is the case of the plaintiff that after service of summons for judgment leave to defend was not applied within the prescribed time of 10 days as contemplated under Order 37 of the Civil Procedure Code. There is a delay in filing the application for leave to defend. However, in the impugned order the trial

court has given a finding that the service of the summons is in accordance with the procedure prescribed in Civil Procedure Code. If it is so then in my opinion the period of 10 days shall commence to run. Trial court has given a finding that by virtue of filing leave to defend petitioner defendant has given a go by to the said objection of not being served by the prescribed procedure.

3. In my opinion, if it is so the court below could not have passed a decree on the ground of delay in seeking leave and refuse to condone the same.

4. In the light of the aforesaid, order dt.16.5.05 is quashed and set aside. Revisional application being 5.11.03 is granted in terms of prayer clause (a) only. The matter is remanded back to the learned Civil Judge, Senior Division, Nasik at Malegaon to decide on merits whether petitioner defendant is entitled to leave and if so on what condition.

5. Both the parties agree that the defence

raised in the written statement filed by the defendant can be considered in support of contention that leave should be granted to the petitioner or not. However, the said written statement should be taken on record only after leave is granted by that court, conditional or unconditional and if leave is refused written statement will not be taken on record. The ground set out in written statement on merits will be allowed to be urged in support of application for leave to defend in the present case. Respondents will be at liberty to file rejoinder if he is so advised. Petition disposed of accordingly. Trial court to dispose of the summons for judgment within 4 weeks from today. There shall be no order as to costs.